(1)

Supreme Court, U.S.
FILED

No. 93-1844 MAY 18 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON, Chief Assistant
Attorney General

GARY W. SCHONS, Senior Assistant
Attorney General

JANELLE B. DAVIS, Supervising
Deputy Attorney General

PAMELA K. KLAHN,
Deputy Attorney General

110 West A Street, Suite 1100
San Diego, California 92101
Telephone: (619) 645-2195

Attorneys for Petitioner

41pp

QUESTIONS PRESENTED

1. May a trial court determine that a criminal defendant is "in custody" for Miranda purposes by considering the police officers' subjective beliefs that he was the "focus of the investigation"? This question is nearly identical to one recently decided by this Court on April 26, 1994, in Stansbury v. California, 93-5770, 1994 U.S. LEXIS 3293.

2. May a trial court exclude a statement made by a criminal defendant after he was advised of and waived his Miranda rights because it was the tainted product of an earlier non-Mirandized statement?

TABLE OF CONTENTS

	Pages
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
HOW THE FEDERAL QUESTION IS PRESENTED	5
REASON FOR GRANTING PETITION	7
STATEMENT OF FACTS	9
The Crime	9
The Motion to Exclude Respondent's Statements	11
ARGUMENT	22
I. THE CALIFORNIA REVIEWING COURT FAILED TO RECOGNIZE THAT A SUBJECTIVE FACTOR SUCH AS "FOCUS OF THE INVESTIGATION" IS NOT A PROPER CONSIDERATION IN DETERMINING CUSTODIAL INTERROGATION	22
II. MIRANDIZED STATEMENTS ARE NOT INADMISSIBLE AS TAINTED PRODUCTS OF EARLIER NON-MIRANDIZED STATEMENTS	32
CONCLUSION	37

TABLE OF AUTHORITIES

Pages

CASES

Berkemer v. *McCarty*
468 U.S. 420 (1984) 27, 29, 30, 31

California v. *Beheler*
463 U.S. 1121 (1983) 26, 28, 29

Minnesota v. *Murphy*
465 U.S. 420 (1984) 29

Miranda v. *Arizona*
384 U.S. 436 (1966) 26, 27

Oregon v. *Elstad*
470 U.S. 298 (1985) 33, 34, 35, 36

Oregon v. *Mathiason*
429 U.S. 492 (1977) 26, 27

People v. *Boyer*
48 Cal. 3d 247 (1989) 23, 25, 31

People v. *Stansbury*
4 Cal. 4th 1017 (1993) 23, 31

Stansbury v. *California*
___ U.S. ____ (April 26, 1994)
62 U.S.L. Week 4279 23, 24, 37

United States v. *Bengivenga*
845 F.2d 593 (5th Cir. 1988) 31

United States v. *Phillips*
812 F.2d 1355, (11th Cir. 1987) 31

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One, issued on December 20, 1993.

OPINION AND ORDER BELOW

The opinion of the California Court of Appeal, Fourth Appellate District,

Division One, is unpublished, and appears herein in Appendix A.

The order of the Supreme Court of California denying Petitioner's Petition for Review appears in Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under title 28, U.S.C. § 1257(3) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division One, which was entered on December 20, 1993. The California Supreme Court denied review in this case on March 24, 1994.

This Petition for Writ of Certiorari is filed within the required 90-day period following the final entry of judgment. The judgment of the Court of Appeal became final for the purposes of this Court with the denial of review by the California Supreme Court on March 24, 1994. Market Street Railroad Co. v. Railroad

Commission, 324 U.S. 548, 550-552, (1994). Thus, the instant judgment is a final decision rendered by the highest court of California interpreting rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 4, 1991, the District Attorney of San Diego County, California, filed a consolidated information against

Respondent charging him with the murder of Luis Coronado on June 29, 1991, in violation of California Penal Code section 187, subdivision (a), alleging Respondent was armed with a firearm, within the meaning of California Penal Code section 12022, subdivision (a)(1). CT 17.[1/]

A jury found Respondent guilty of second degree murder, and found true the allegation that he was armed with a firearm during the commission of the murder. CT 41, 165, 168.

On April 16, 1992, the court sentenced Respondent to 15 years to life for second degree murder and added one year for the firearm enhancement. CT 135-136, 170.

---

1. "CT" refers to the Clerk's Transcript of the trial court's documents and orders. "RT" refers to the Reporter's Transcript of the trial court proceedings. Both documents were included as part of the official record on appeal before the California Court of Appeal and the California Supreme Court.

On December 20, 1993, the court of appeal reversed the murder conviction on the ground that Respondent's non-Mirandized and Mirandized statements to police should have been excluded because he was not advised of his Miranda rights while in custody. App. A at A-2. On March 24, 1994, the California Supreme Court denied Petitioner's Petition for Review. App. B. Remittitur issued on April 21, 1994. App. C.

HOW THE FEDERAL QUESTION IS PRESENTED

At a pre-trial evidentiary hearing in the San Diego County, California, Superior Court, Respondent moved to suppress statements made by him to police during police station interviews. He claimed the police subjected him to a custodial interrogation without first advising him of his Miranda rights. CT 143-145; I RT 123. The trial court denied Respondent's motion to suppress the statements, ruling

that the police officers' non-Mirandized interview of Respondent was a non-custodial questioning which did not require a Miranda warning. CT 145; I RT 123-124.

The California Court of Appeal, Fourth Appellate District, Division One, reversed Respondent's conviction for murder, holding that his statements should have been excluded. App. A at A-2. It held that Respondent had been subjected to custodial interrogation when he "became the focus of the investigation" during a non-Mirandized interview. App. A at A-17, A-18. The court further held that Respondent's subsequent Mirandized statements should have been suppressed, since they were the tainted product of the earlier non-Mirandized statements. App. A at A-19.

Petitioner filed a Petition for Review to the California Supreme Court,

arguing that the court of appeal had erred by 1) applying a subjective factor -- focus of the investigation -- to its determination of whether Respondent was in custody for purposes of Miranda, and 2) holding that subsequent Mirandized statements were inadmissible as tainted products of the earlier non-Mirandized statements, contrary to federal law. The California Supreme Court denied Petitioner's request for review. App. B.

REASONS FOR GRANTING PETITION

The court of appeal decision in Pimentel is in conflict with decisions of this Court. As this Court stated in Stansbury v. California, U.S. LEXIS 3293 (1994), "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."

This Court has repeatedly held that a subjective factor such as "focus of the investigation" is not a proper consideration in determining "custody" for purposes of Miranda. Berkhemer v. McCarty, 468 U.S. 420, 442 (1984) [82 L. Ed. 2d 317; 104 S. Ct. 3138]; Minnesota v. Murphy, 465 U.S 420, 431 (1984) [79 L. Ed. 2d 409; 104 S. Ct. 1136]; California v. Beheler, 463 U.S. 1121 (1983) [77 L. Ed. 2d 1275; 103 S. Ct. 3517]; Oregon v. Mathiason, 429 U.S. 492, 495 (1977) [50 L. Ed. 2d 714; 97 S. Ct. 711]; Beckwith v. United States, 425 U.S. 341, 347 (1976) [48 L. Ed. 2d 1; 96 S. Ct. 1612].

Furthermore, this Court has held that the fifth amendment does not require suppression of a Mirandized statement solely because the police had obtained an earlier voluntary but non-Mirandized statement from the suspect. Oregon v.

Elstad, 470 U.S. 298, 303-318 (1985) [84 L. Ed. 2d 222; 105 S. Ct. 1285].

STATEMENT OF FACTS

A. The Crime

Shortly after midnight on Friday, June 28, 1991, Luis Coronado (Big Man), a member of the Old Town National City (OTNC) street gang, fellow gang member Eddie Bellot (Eddie Boy), and Gabriel Mejia (Chito) were standing together on the corner of 16th Street and Coolidge in National City. II RT 373, 374, 79. A dark blue Monte Carlo or Regal pulled up near them. II RT 379, 380, 392, 414, 447, 459, 452. A male passenger got out of the car, walked to the rear, and asked where Coronado and his friends were from. II RT 381, 385, 453, 456. They replied that they were from "OTNC." II RT 385.

Suddenly the passenger pulled out a gun from under his shirt. II RT 386, 387, 402, 457, 458. Bellot and Coronado began running. Three to five shots were fired. II PT 386, 388, 459. Bellot heard Coronado yell his name, and when Bellot turned around, he saw Coronado lying on the ground. II RT 386, 388. The car and the shooter were gone. II RT 388, 460. Coronado died at the scene from multiple gunshot wounds. III RT 520-521, II RT 390; IV RT 653, 654, 655, 657, 659.

Respondent subsequently admitted to police that he and a fellow gang member named "Flips" (Felipe Juarez) had been involved in the altercation at the 7-Eleven the night of the shooting. Supp. CT 102, 106, 107, 110, 112-114. They had fought with some males there, left the 7-Eleven, and driven to National City to look for some OTNC gang members to fight

in order to pay them back for what had happened at the 7-Eleven. Supp. CT 102-103, 115-116, 154.

In National City they saw a group of males on the street corner, and Juarez said "Yeah, that's them." Supp. CT 114, 119, 120, 122. After an exchange of words and gang signs, Juarez got out of the car, walked to the back of the car, and fired at the three males. Supp. CT 122, 123, 103, 104, 105, 126, 127.

Felipe Juarez was also arrested for the murder of Luis Coronado. IV RT 619.

B. <u>The Motion To Exclude Respondent's Statements</u>

A pre-trial evidentiary hearing was held on Respondent's motion to exclude his statements made to police, at which Detective Boegler, Investigator Marquez, and Respondent testified and tape

recordings of the Mirandized interviews were played.

1. The July 29, 1991, Non-Mirandized Interview

At about 3 p.m. on July 29, 1991, National City Police Detective Craig Boegler and District Attorney Gang Investigator Robert Marquez went to Respondent's place of employment to photograph his vehicle, which matched a description of the suspect vehicle. I RT 25, 34, 98. A day or two earlier the officers had learned that Respondent owned a vehicle that was similar to the suspect vehicle -- a Chevrolet Monte Carlo. I RT 33.

Respondent was not a suspect in the shooting at that time, however, and the officers had no intention of speaking to him that day. I RT 32-33, 36, 103. They

only wanted to take pictures of the car and show them to witnesses. I RT 33.

While the officers were in the process of taking Polaroid photos of the car in the parking lot, Respondent came outside and asked the officers what they were doing. I RT 25, 44, 98. They advised Respondent what they were doing and why, and asked if he would mind talking to them. I RT 25-26, 103. The officers explained that the reason they wanted to talk to him was because they had information that a vehicle similar to his was used in the shooting, and that they were running down as many leads as possible. I RT 36.

Respondent was just one of several leads the officers were pursuing who "perhaps was the owner of the vehicle in question." I RT 102, 97. As Investigator Marquez said, "Mr. Pimentel was not a

suspect. We only wanted to question him about the vehicle and either to eliminate him as a possible suspect, and he -- and get more information. We were trying to run down as many leads as we possibly could." I RT 36.

Respondent agreed to talk to the officers. I RT 26, 102. Although they told him he could drive himself to the police station, he asked if they would follow him home so he could drop off his car and then ride with the police to the station. I RT 26, 99.

After arriving at the police station at about 4:30 p.m., the officers took Respondent into an interview room and began questioning him about the whereabouts of his vehicle on the night of the shooting. I RT 26-27, 101. Investigator Marquez did not take any

notes or generate a report during this interview. I RT 37.

The officers explained to Respondent that because of the type of car he owned and his knowledge about or possible affiliation with the Calle Treinta street gang, they wanted to determine his possible involvement in the homicide. I RT 35. The officers believed that the killing was basically between two gangs, Calle Treinta and Old Town National City (OTNC), and that Calle Treinta gang members might be responsible for the shooting. I RT 27, 35, 104, 106. The officers asked Respondent about his vehicle, his possible involvement with gangs and his whereabouts on the night of June 28, 1991. I RT 46, 104-105.

The officers were also interested in whether Respondent was involved in a fight at the 7-Eleven that evening, since one

theory they were exploring was the possibility that the fight at the 7-Eleven might be tied to the later shooting. I RT 105. This theory surmised that Calle Treinta gang members involved in a fight with OTNC gang members at the 7-Eleven prior to the shooting might have returned to National City and committed the shooting. I RT 105-106.

During the questioning, Detective Boegler falsely told Respondent that he had a videotape showing him and his car at the 7-Eleven that night, in order to learn whether Respondent was there or not. I RT 108, 109, 89, 90, 91.

Although initially Respondent claimed that he knew "nothing about what we were talking about," he eventually admitted that he associated with members of the Calle Treinta gang, and had been at the 7-Eleven store with fellow gang members

"Sparky" and "Smurf" a week before the shooting. I RT 27, 48, 109. At the point at which Respondent admitted that he associated with Calle Treinta gang members, Investigator Marquez thought "Hey, maybe we're on to something. In my own mind, maybe we're on to something. Maybe we're close." I RT 48.

Respondent later told Detective Boegler that he had been at the 7-Eleven on the night of the shooting, but there had been no fight. I RT 110.

At that point Respondent became a suspect in the case and was given his Miranda rights. I RT 27-28, 110. He said he understood those rights and agreed to talk to the officers. Supp. CT 5. The questioning had lasted about an hour and a half. I RT 47, 46, 103.

2. The July 29, 1991, Mirandized Interrogation

The interview began at the police station at approximately 7:15 p.m. and lasted until 8:48 p.m. I RT 45, 114; Supp. CT 2, 96. Investigator Marquez advised Respondent that because they wished to ask him more questions, they were going to advise him of his Miranda rights at that time. Detective Boegler then read Respondent his rights, and Respondent said he understood those rights and was willing to talk to the officers. Supp. CT 4-5.

Through much of the interview, Respondent variously denied that he had been at the 7-Eleven store the night of the shooting, had gone into Memorial Park the night of the shooting, or had been at the shooting scene, then he admitted his presence, and then he retracted his

admissions. Supp. CT 61-62, 69, 76-77, 79-82, 83, 85-88, 92.

Respondent ultimately told the officers that he had driven "Sparky" and "Smurf" to the shooting scene, where "Sparky" and "Smurf" shot at a group of men standing on the corner. At this point Respondent was arrested and booked into jail on one count of murder. I RT 39, 113; Supp. CT 94, 95, 96, 85-88.

3. The July 30, 1991, *Mirandized* Interrogation

After following up on information given to them by Respondent the previous day, Detective Boegler and Investigator Marquez "felt we had a pretty good picture of what had happened" and wanted to talk to him again to clear up a few things. I RT 115. The next day, July 30, 1991, Detective Boegler and Investigator Marquez

returned to the jail to reinterview Respondent. I RT 115.

The second interview was also tape recorded. I RT 40. At the commencement of this taped interview, Respondent was readvised of his Miranda rights, said he understood them, and agreed to talk to the officers. Supp. CT 99-100; I RT 40-41.

During this interview, Respondent admitted that he and Felipe Juarez had been involved in an altercation with OTNC gang members on the night of the shooting. They then drove to National City, where Juarez confronted some OTNC gang members on the corner, got out of the car, and fired shots at them.

This interview lasted a little over one hour. I RT 41; Supp. CT 156.

4. The Trial Court's Ruling

The trial court ruled that the officers' non-Mirandized interview of Respondent was "a noncustodial questioning in which the defendant was present voluntarily." I RT 123. Accordingly, no Miranda warning was required at that time. I RT 123. The court concluded:

> It was made clear that he could leave at any time he wanted to. He was not under arrest. The suspicions that they had, while focused upon the defendant, were not such that required a Miranda warning, but most importantly, he was not in custodial status. So there's no basis to suppress because of a result of Miranda.

I RT 23-124.

ARGUMENT

I

THE CALIFORNIA REVIEWING COURT FAILED TO RECOGNIZE THAT A SUBJECTIVE FACTOR SUCH AS "FOCUS OF THE INVESTIGATION" IS NOT A PROPER CONSIDERATION IN DETERMINING CUSTODIAL INTERROGATION

The court of appeal in Pimentel erroneously held, contrary to federal law, that Respondent was subject to custodial interrogation during the interview when he "became the focus of the investigation." App. A at A-17, A-18. The court reversed Respondent's conviction for murder, holding that his statements to police should have been excluded. App. A at A-2. Citing the California Supreme Court's four-factor test for determining custodial interrogation[2/], the court held that

---

2. The California Supreme Court held that "the most important considerations [in determining 'custody' for Miranda purposes] include (1) the site of the interrogation, (2) whether the investigation has focused on the

Respondent had been subjected to custodial interrogation when he "became the focus of the investigation" during a non-Mirandized interview. App. A at A-17, A-18.

This holding is in conflict with federal law. This Court recently decided Stansbury v. State of California (___ U.S. ____ (April 26, 1994) [62 U.S. L. Week 4279], a case presenting a nearly identical issue -- whether a subjective factor is a proper consideration in determining custodial interrogation for Miranda purposes. In Stansbury, this Court held that "an officer's subjective and undisclosed view concerning whether

---

subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." People v. Boyer, 48 Cal. 3d 247, 272 (1989); accord People v. Stansbury, 4 Cal. 4th 1017, 1050 (1993), revd. with instns. to California Supreme Court, see sub. opn. Stansbury v. California 62 U.S.L. Week at 4281.

the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody" for Miranda purposes. Stansbury v. California 62 U.S.L. Week at 4279.

Here, as in Stansbury v. California, one of the issues presented to this Court is whether a subjective factor, such as focus of the investigation, which depends in large part on police officers' subjective beliefs, should be considered in determining custody for Miranda purposes. Like Stansbury, the court of appeal in this case also relied on People v. Boyer, 48 Cal. 3d 247, in erroneously holding that Respondent was subject to custodial interrogation when he "became the focus of the investigation." As the Pimentel court here said:

> While the questioning initially related to general subjects which Pimentel could have

> responded without incriminating himself, it thereafter became much more focused. The crucial shift in questioning in our opinion came when the officers commenced falsely advising Pimentel that they had a videotape of his car at the store on June 28. At this point we believe Pimentel ceased to be simply a source of general information, or even one of several possible lead, and became the focus of the investigation. . . .
> The Miranda warning was not given until after this focused interrogation was commenced; . . . After reviewing the totality of the circumstances, as directed in Boyer[3/] (i.e., the setting at the police station, the one and one-half to two hours of interrogation before the Miranda advisement was given, and the use of false information to elicit an admission [fn. omitted]), we conclude a reasonable man in Pimentel's situation would have understood his freedom of movement had become so restricted that he was 'in custody.'

App. A at A-16 - A-17.

---

3. People v. Boyer 48 Cal.3d at 272.

Under Miranda v. Arizona, (1966) 384 U.S. 436, 444, custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." While the concept of custody does not lend itself to easy definition, "the ultimate inquiry is simply whether there is a `formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, (1983) 463 U.S. 1121, 1125, quoting Oregon v. Mathiason, (1977) 429 U.S. 492, 495.

The determination of "custody" must depend on the totality of the circumstances. See California v. Beheler, 463 U.S. at 1125. Custodial status is evaluated by "how a reasonable man in the suspect's position would have understood

his situation." Berkemer v. McCarty, (1984) 468 U.S. 420, 442. Thus, courts must employ objective criteria to determine the requisite level of restraint for Miranda purposes.

In Beckwith v. United States, 425 U.S. 341 (1976), this Court repudiated the notion that the focus of suspicion translated into custody:

> Although the `focus' of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding.

Id. at 347.

In Oregon v. Mathiason, 429 U.S. at 492, this Court held that Miranda warnings are not required simply because the questioned person is one whom the police suspect:

> *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Id. at 495.

In California v. Beheler, 463 U.S. at 1121, this Court reiterated its earlier holdings that custody is not established because an individual is the focus of a criminal investigation:

> Our holding in *Mathiason* reflected our earlier decision in *Beckwith* v. *United States*, 425 U.S. 341 (1976), in which we rejected the motion that the 'in custody' requirement was satisfied merely because the police interviewed a person who was the 'focus' of a criminal investigation.

California v. Beheler, 463 U.S. at 1124, n.2.

> Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving

> *Miranda* protection, the ultimate inquiry is simply whether there is a `formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.

California v. Beheler, 463 U.S. at 1125.

In Minnesota v. Murphy, 465 U.S. 420 (1984), this Court again repudiated a necessary connection between focus of suspicion and custody: "The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings (*Beckwith* v. *United States* 425 U.S. 341 (1976). . ." Minnesota v. Murphy, 465 U.S. at 431. In Berkhemer v. McCarty, 468 U.S. 420 (1984), this Court explicitly rejected a subjective test for determining custody. "A policeman's unarticulated plan has no bearing on the question whether a suspect was `in custody' at a particular time; the only relevant inquiry

is how a reasonable man in the suspect's position would have understood his situation." Berkhemer v. McCarty, 468 U.S. at 441-442.

While California law purports to define custody in terms of the reasonable person People v. Stansbury, 4 Cal. 4th 1017, 1050 (1993); People v. Boyer, 48 Cal. 3d 247, 272 (1989), citing Berkemer v. McCarty, 468 U.S. at 442, the California Supreme Court has included a subjective criteria -- focus of the investigation -- among one of the four factors relevant to determining custody: "[T]he most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." People v.

Stansbury, 4 Cal. 4th at 1050; People v. Boyer, 48 Cal. 3d at 272.

The California practice of including the focus of investigation as a factor in determining custody does not comport with current Miranda jurisprudence. This factor is "no longer compatible with Supreme Court precedent." United States v. Bengivenga, 845 F.2d 593, 597 (5th Cir. 1988). The objective standard of the reasonable man governs custody issues "because, unlike a subjective test, it `is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" Berkemer v. McCarty, 468 U.S. at 442, n.35; see United States v. Phillips, 812 F.2d 1355, 1359-60 (11th Cir. 1987).

ARGUMENT

II

MIRANDIZED STATEMENTS ARE NOT INADMISSIBLE AS TAINTED PRODUCTS OF EARLIER NON-MIRANDIZED STATEMENTS

The court of appeal ruled, contrary to federal law, that the Mirandized statements respondent made on July 29, 1991, and July 30, 1991, should be excluded because "[u]nder California law a non-Mirandized confession is presumed to taint a later Mirandized confession. [Citations.]" App. A at A-18. The court found Respondent's Mirandized statements "were inextricably" linked to the non-Mirandized statements, the court found. App. A, at A-19. As the court said:

> The statements during the first day's taped interview were part of the same continuous interrogation conducted at the same location by the same officers. The second day's [Mirandized] interview was but a continuation of the first. The

> taped post-Miranda admissions and confession were the product of the initial pre-Miranda custodial interrogation and were improperly admitted.

App. A at A-19.

The court of appeal's analysis is contrary to Oregon v. Elstad, 470 U.S. 298 (1985), wherein this Court ruled that the fifth amendment does not require the suppression of an admission made after proper Miranda warnings and a valid waiver thereof solely because the police had obtained an earlier voluntary but non-Mirandized admission from the suspect. (Id. at 303-318.) The fifth amendment prohibits the use only of compelled testimony, and failure to administer Miranda warnings creates a presumption of compulsion, requiring exclusion of the non-Mirandized statements. (Id. at 306-307.)

Elstad held that the Miranda presumption does not require that fruits of otherwise voluntary statements be excluded as inherently tainted, however. It is an unwarranted extension of Miranda to hold that simple failure to administer Miranda warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective. (Id. at 304-309.) As this Court said in Elstad: "Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (Id. at 309.)

> [A]bsent deliberately coercive or improper tactics in obtaining the initial [non-Mirandized] statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Oregon v. Elstad, 470 U.S. at 314.

The court of appeal in Pimentel did not analyze the admissibility of Pimentel's Mirandized statements under controlling federal law as set forth in Oregon v. Elstad. Rather, it erroneously concluded that since "under California law a non-Mirandized confession is presumed to taint a later Mirandized confession," and the subsequent Mirandized statements were all part of the same continuous interrogation begun with the non-Mirandized statements, all the statements,

Mirandized or not, should have been excluded. App. A at A-18, A-19. The court did not consider whether Pimentel's subsequent Mirandized statements were made knowingly and voluntarily[4], as directed by Elstad.

The Pimentel court erred in holding that Pimentel's Mirandized statements should be excluded because they were the tainted product of his non-Mirandized statements. Application of federal law under Oregon v. Elstad compels the admission of the Mirandized statements, since they were knowingly and voluntarily made.

---

4. In denying appellant's motion to exclude his statements on the ground they were coerced and involuntarily, the trial court found there was no evidence to indicate the statements were coerced or involuntarily. I RT 124.

CONCLUSION

Accordingly, for the reasons stated, Petitioner respectfully asks that the petition for certiorari be granted to review the decision of the California Court of Appeal in this case and that this Court reverse and remand it back to the Court of Appeal with directions to reconsider in light of Stansbury v. California.

DATED this 12th day of May, 1994

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General of the State of California

GEORGE WILLIAMSON, Chief Assistant Attorney General

GARY W. SCHONS, Senior Assistant Attorney General

JANELLE B. DAVIS, Supervising Deputy Attorney General

Pamela K. Klahn

PAMELA K. KLAHN,
Deputy Attorney General

Attorneys for Petitioner